Federal Maritime Commission

Docket No. 11-22; Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements; Tariff Publishing Exemption

EDWARD Greenberg <EGreenberg@gkglaw.com> Mon, Apr 29, 2013 at 1:45 PM
To: secretary@fmc.gov
Cc: rfenneman@fmc.gov

Secretary Gregory,
Attached are the Comments of the NCBFAA in response to the NPRM issued in this docket on February 21, 2013. If you have any questions about this, please do not hesitate to contact me.

(See attached file: Scanned from a Xerox multifunction device001.pdf)

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BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 11-22

NON-VESSEL-OPERATING COMMON CARRIER NEGOTIATED RATE ARRANGEMENTS – TARIFF PUBLICATION EXEMPTION

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

In a Notice of Proposed Rulemaking ("NPRM") issued February 21, 2013, the Commission sought comments from the public concerning its proposal to extend the exemptions in 46 C.F.R. Part 532 pertaining to NVOCC negotiated rate arrangements ("NRAs') to foreign-based unlicensed NVOCCs. The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") is pleased to submit its view in support of this proposal.

I. BACKGROUND

As the Commission is well-aware, the NCBFAA urged for a number of years that NVOCCs should be exempted from the mandatory publication requirements otherwise applicable for rate tariffs. (*See, e.g.*, the NCBFAA's Petition for Exemption in Docket P1-08, filed July 31, 2008.) Those efforts ultimately bore fruit when the Commission issued its decision in early 2011 that implemented the NRA procedure that is codified in 46 C.F.R. Part 532 and made this exemption available to U.S.-based, licensed NVOCCs.[1]

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[1] Docket No. 10-03, *Non-Vessel Operating Common Carrier Negotiated Rate Arrangements*, decision issued February 25, 2011.

Parenthetically, although it has now been in effect for almost two years, there are still a large number of domestic NVOCCs that have not yet sought to take advantage of the exemption. The NCBFAA believes that the transition from tariffs to NRAs has been slower than expected due in large part to industry perceptions about the complexity and technical requirements of the existing regulations. As the existing regulations in Part 532 could be

II. THE PROPOSAL SHOULD BE ADOPTED

From the outset, the NCBFAA consistently urged the Commission to make the NRA exemption applicable to all lawfully operating NVOCCs. The Association contended, and the Commission agreed, that the continued existence of NVOCC rate tariff publication no longer serves a useful purpose. Shippers don't use or rely on them and are well able to conduct their commercial relationships with NVOCCs through the private negotiation process that has evolved since the enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"). The only support for the continued requirement of mandatory tariff publication has come from several tariff publishers, who understandably are not pleased to lose a significant source of revenue. That some NVOCCs are domiciled abroad and are therefore registered, rather than licensed, does not alter the reality that NVOCC rate tariffs are a throwback, a burdensome regulatory requirement that has no redeeming public benefit. And, as mandatory tariff publication unnecessarily increases NVOCC transaction costs, the requirement adversely affects the competitiveness of this industry.

For various reasons, the Commission decided in 2011 not to extend the NRA exemption to foreign-based unlicensed NVOCCs. According to the NPRM, this was attributable to the fact that some in FMC Staff apparently were concerned that broadening the exemption "could hamper the Commission's ability to protect the shipping public." (NPRM at 3.) The Association did not then, and still does not, agree that this concern was an appropriate basis – even if well-founded – to withhold the exemption from foreign-based entities.

Until the enactment of OSRA, one of the affirmative prerequisites to the issuance of an exemption was the requirement that the proponent of an exemption demonstrate that it would

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simplified without harming the shipping public, further simplification would expand those benefits to more companies.

"not substantially impair effective regulation by the Commission." (Former Section 16 of the Shipping Act of 1984.) But that criterion was eliminated with the enactment of OSRA. The issuance of an exemption now is dependent only on a showing that proposal will not result in a substantial reduction in competition or otherwise be detrimental to commerce. 46 U.S.C. §40103. Thus, while the NCBFAA agrees that the Commission should not issue exemptions that adversely affect the shipping public, there was no record or other evidence produced in Docket 11-22 or its predecessor dockets indicating that eliminating mandatory NVOCC tariff publication would likely have such an effect.

Nonetheless, and turning to the situation today, relieving foreign-registered NVOCCs from the obligation to publish rate tariffs will not result in a substantial reduction in competition. To the contrary, extending this relief would increase competition in the ocean transportation industry by freeing foreign-based companies from the same unnecessary formalities and costs that once burdened their U.S. counterparts. There being no harm to shippers, extending the exemption would increase, rather than reduce, the overall level of competition in this industry. Similarly, lifting these regulatory burdens would not adversely affect competition between NVOCCs, since it would be available to all companies regardless of size. And, since no shipper or carrier has objected to granting the exemption even to allege that there might be some perceived economic harm resulting from this, going forward with the proposal would clearly further the competitive policy added by OSRA.

The record is clear that eliminating the unnecessary and unproductive costs of tariff publication for foreign-registered NVOCCs can only serve to increase economic efficiency in the ocean transportation industry. These companies will be able to react more timely to the rapidly

changing rates and services provided by the vessel operating common carriers, and will thus be better positioned to serve their customers.

In addition, relieving foreign-based NVOCCs of these publication obligations will also have the salutary effect of making United States regulation of ocean transportation intermediaries more closely aligned with the practices of all our major international trading partners. At the same time, removing the artificial distinction between U.S. and foreign NVOCCs will avoid possible regulatory measures of foreign governments seeking to level the playing field between their nationals and those of the U.S.

Extending the exemption will not remove any protection available to shippers through the Shipping Act. No NVOCC or shipper is required to rely on negotiated rates, as they can continue to do business based on published tariffs. To the extent the foreign NVOCCs do use NRAs, the proposed exemption would not disturb or remove protections in the Act that prohibit false billings, classifications or other unfair or unjust efforts to either obtain transportation at inappropriate rates or to otherwise engage in fraudulent billing practices to the detriment of shippers. Instead, the exemption would apply only to how rate quotes established through bilateral negotiations are published and agreed to, so that the prohibitions against fraudulent practices embodied in the Act would continue to exist.

The NCBFAA believes that the four conditions suggested in the NPRM as a prerequisite for use of the exemption are reasonable, appropriate and will serve to provide adequate assurance both to the Commission and the shipping public that the exemption is not being misused. As we understand it, the four conditions are as follows:

1. the exemption will be extended only to those foreign-based unlicensed NVOCCs that are properly registered, bonded and tariffed;

2. these registrations are to be effective for a period of three years, but can then be renewed;
3. the registrations can be terminated or suspended if there is non-compliance; and
4. any NVOCCs taking advantage of the NRAs are subject to the Commission's normal inspection and record production requests.

These conditions will put U.S.-licensed and foreign registered NVOCCs on a level playing field and do not impose any burden on foreign entities that is greater than that currently borne by domestic NVOCCs.

The basic registration process proposed in what would be new § 515.19 seems reasonable and would appear to would give the Commission the information it deems necessary to carry out its regulatory responsibilities. The NCBFAA does not believe that providing basic information about a foreign company's identity, appointing an agent for service of process or agreeing to comply with legitimate document requests is an inappropriate prerequisite to companies that are doing business in the US trades. Other countries may impose similar requirements on foreign companies doing business there,[2] so there is nothing unusual in now having entities engaged in business that affects US commercial interests providing the FMC with the same minimal information required of US NVOCCs.

As the Commission is well aware, US. licensed OTIs are required to advise the Commission of any changes in their addresses, corporate structure, qualifying individual or other management within thirty (30) days after the occurrence of any of these events. (*See* 46 C.F.R. §

[2] See, for example, the Implementing Rules of the Regulations of the People's Republic of China on International Maritime Transportation, Article 11.

515.12(d).)[3] As the FMC is charged with regulating the OTI industry, the agency has a legitimate need for current and accurate information about the companies engaged in this business. Consequently, the NCBFAA believes that the proposed three (3) year renewal registration requirement for all foreign-based NVOCCs is neither burdensome nor inappropriate.

The NCBFAA also feels that the method proposed by the FMC to implement this renewal requirement is reasonable, in that it will impose the least amount of cost and burden on companies electing to conduct business as NVOCCs in the US trades. As proposed, the registration renewal process is to be accomplished using a simplified format that is to be submitted electronically without the imposition of any filing fee. The NCBFAA believes that this procedure provides the necessary information without imposing unnecessary costs on the industry or having paper documents that then need to be organized, reviewed, and filed pile up at the agency.

This proposed rulemaking is a positive and important step, and the NCBFAA appreciates the Commission's willingness to broaden the NRA exemption. The proposal will benefit the entire NVOCC community by simplifying the regulatory procedures so that all NVOCCs play by a single set of rules. And, those rules will permit the NVOCC industry to dispense with costly and useless rate tariff publication, free scarce NVOCC resources in order to provide more effective and efficient service, thus benefiting shippers and NVOCCs alike.

Accordingly, the NCBFAA supports broadening the NRA exemption and the proposed new rules so as to make it applicable also to properly register foreign-based NVOCCs.

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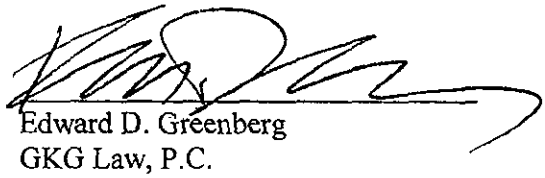
[3] Of course, the Commission's regulations impose many other significant requirements on US OTI licensees than just providing descriptive corporate information and maintaining surety bonds.

Respectfully submitted,



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